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HAROLD B. WILL

In the

Supreme Court of the United States

OCTOBER TERM, 1955

No. 236

CORA REYNOLDS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

Case No. 27,258, Court of Criminal Appeals of the State of Texas

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Cora Reynolds, hereinafter referred to as petitioner, prays that writ of certiorari issue to the Court of Criminal Appeals of the State of Texas to review a judgment of final conviction of petitioner, dated March 16, 1955 (R. 159), adjudging her guilty of operating a bawdy house, and sentenced to confinement in the County Jail of

Dallas County, Texas, for a period of three hundred and eighty (380) days, and a fine of Three Thousand Eight Hundred Dollars ($3,800.00), together with costs (R. 66).

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Criminal Appeals of the State of Texas affirming petitioner's conviction and sentence of the trial court, the dissenting opinion of Associate Justice Davidson of the Court of Criminal Appeals of the State of Texas, and the majority opinion of the Court of Criminal Appeals denying petitioner's motion for rehearing have not been officially reported, but are reprinted herein as Appendix A, B, and C respectively.

JURISDICTION

The judgment of the Court of Criminal Appeals of the State of Texas was entered on January 5, 1955 (R. 136); rehearing was denied on March 16, 1955 (R. 159). On the 13th day of June, 1955, the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States, granted petitioner an extension of time in which to petition for certiorari to and including July 14, 1955 (reproduced as Appendix D).

The jurisdiction of this court is invoked under Section 1257(3) Title 28 of the United States Code, Annotated, in that under the judgment of the State Court petitioner is deprived of her liberty and property without due process of law as guaranteed to her by the 14th Amendment to the Constitution of the United States.

HOW QUESTION WAS RAISED

By motion for new trial filed in trial court prior to appeal and before judgment was entered, petitioner alleged that the testimony of three witnesses for the State, being the only testimony in the record connecting petitioner with the operation of a bawdy house, was perjured testimony, and that because of her conviction being based on this perjured testimony, she had been denied a fair trial, and a new trial should be granted (Paragraph 10 of Motion for New Trial, R. 68-69). On appeal from order denying new trial petitioner urged in the Court of Criminal Appeals that the trial court erred in refusing petitioner a new trial. On motion for rehearing petitioner pointed out to the Court of Criminal Appeals that for the Court to affirm a conviction supported by perjured testimony and the Court's refusal to consider petitioner's Bill of Exception to the trial court's refusal to consider testimony conclusively showing that the conviction was obtained by use of perjured testimony was a denial of due process of law (Motion for Rehearing, Par. VI, R. 142).

The Court of Criminal Appeals of Texas is the Court of last resort and the judgment of that court entered on March 16, 1955, became final as fully appears in the Clerk's Certificate reprinted herein as Appendix E.

QUESTIONS PRESENTED

The sole basis of the conviction of petitioner was perjured testimony, knowingly used by the prosecuting authorities to obtain that conviction. This fact was called to the atten-

tion of the trial court at a time when that court had full power and jurisdiction to grant a new trial. This the trial court refused to do. The Court of Criminal Appeals held that it was not error to allow the conviction obtained by perjured testimony to stand because the pleadings raising the question were not verified.

The question here presented is: "Does a conviction obtained under the facts above stated violate the due process provision of the 14th Amendment to the Constitution of the United States?"

STATE STATUTES INVOLVED

The State Statutory Provisions involved are Articles 753, 754, and 757 of C. C. P. of the State of Texas. They are reprinted in Appendix F hereto.

STATEMENT

On January 29, 1954, petitioner was charged by a complaint and information filed by the District Attorney of Dallas County, Texas, with operating a bawdy house. The information contained twenty-six (26) separate counts and alleged the commission of the offense of operating a bawdy house on or about twenty-six (26) different dates ranging from the 20th day of May, 1953, through the 24th day of January, 1954 (R. 18-31). On March 18, 1954, the jury returned its verdict finding petitioner guilty of keeping a bawdy house on nineteen (19) counts of the information. The verdict of the jury being "Not Guilty" on the first seven (7) counts of the information (R. 61-63). A convic-

tion carrying a mandatory sentence under Article 514 of the Penal Code of the State of Texas of a fine of Two Hundred Dollars ($200.00) and confinement in the County Jail for twenty (20) days for each day she was convicted of operating a bawdy house. Judgment was accordingly entered on March 18, 1954, ordering petitioner confined in the County Jail for three hundred and eighty (380) days, and a fine of Three Thousand Eight Hundred Dollars ($3,800.00), together with costs of court. (R. 66.)

From said verdict of the jury and sentence and judgment of the court, petitioner duly and timely filed in the trial court a motion for a new trial. Petitioner's amended motion for new trial was filed April 7, 1954, containing twenty-two (22) assignments of error. Paragraph ten (10) of petitioner's motion for new trial alleged as a fact that petitioner was convicted at the trial of the case on perjured testimony, and that the testimony of the principal State's witnesses was false testimony (R. 71). On April 26, 1954, a hearing was had on petitioner's motion for new trial in the trial court, and at said hearing petitioner tendered to the court the witnesses, Mrs. B. E. Nelson, Louis Livingston, and Lorenzo Livingston, being material witnesses for the State at the trial of the case, and being the only witnesses testifying for the State who testified to matters and facts which would connect petitioner with the operation of a bawdy house as charged in the information. The trial court refused to hear the testimony tendered by petitioner, and then and there and at the hearing on the motion for

a new trial in open court the petitioner made and perfected its bill of exception No. One as follows:

No. 52,765

DEFENDANT'S BILL OF EXCEPTION,
filed July 6, 1954

THE STATE OF TEXAS

v.

CORA REYNOLDS

IN THE COUNTY CRIMINAL COURT OF DALLAS COUNTY, TEXAS, MARCH TERM, A. D. 1954

BILL OF EXCEPTION

Defendant's Bill of Exception No. One:

BE IT REMEMBERED that on the 26th day of April, A. D. 1954, came on to be heard defendant's amended motion for new trial, and came the State of Texas by and through its District Attorney, and came the defendant in person and by and through her attorneys of record and announced ready on said motion:

WHEREUPON the defendant by and through her attorneys of record presented to the Court her motion for a new trial theretofore filed in due time and manner provided by law, and paragraphs one through twenty-two of said motion was presented to the Court and whereupon the de-

fendant called as witnesses in support of her motion for a new trial, and paragraph ten of said motion the witnesses, Mrs. B. E. Nelson, Louis Livingston, and Lorenzo Livingston; that said witnesses were present in Court on the 26th day of April, 1954, and at the time that defendant's motion for a new trial was heard and that the testimony of the witnesses was offered to the Court in support of defendant's motion;

WHEREUPON the State of Texas by and through its District Attorney objected to the admission of any testimony from the witnesses, Mrs. B. E. Nelson, Louis Livingston, and Lorenzo Livingston; and be it remembered that the Court sustained the objection of the District Attorney to the admission of the testimony of said witnesses and refused to allow the defendant to present the testimony of said witnesses in support of her motion for a new trial or perfecting of her bill of exception.

WHEREUPON the defendant in open Court and on the 26th day of April, 1954, and at the time defendant's motion for a new trial was heard, requested the Court to allow her to dictate a Bill of Exception and dictate into the record what she purported to prove by the testimony of the witnesses had they been allowed to testify;

WHEREUPON the Court granted defendant's request to be allowed to dictate her Bill of Exceptions to the proceedings and rulings of the Court on the exclusion of the testimony of the witnesses, Mrs. B. E. Nelson, Louis Livingston, and Lorenzo Livingston.

WHEREUPON, in open Court on the 26th day of April, A. D. 1954, and at the time of the hearing of defendant's motion for a new trial and while the tendered witnesses were still present in the Courtroom the defendant dictated into the record the foregoing Bill of Exception and made the following profert testimony:

Defendant would show to the Court that had she been allowed to develop the testimony of the witnesses, Mrs. B. E. Nelson, Louis Livingston, and Lorenzo Livingston, the defendant would have shown by the testimony of the said witnesses that their testimony given at the trial of this cause wherein the aforesaid witnesses testified as to the acts or conduct on the part of the defendant tending to prove that she aided and abetted in the keeping of prostitutes at the Triple R Motel, or knowingly permitted the keeping of prostitutes at the Triple R Motel, was false testimony. That had Mrs. B. E. Nelson been allowed to testify on the hearing of the motion for a new trial, she would have testified that the testimony she gave upon the trial of this cause on the guilt or innocence of the defendant wherein she testified that she had discussed the keeping of prostitutes at the Triple R Motel with Mrs. Reynolds, and that she had tried to persuade Mrs. Reynolds not to keep prostitutes at the Triple R Motel; and wherein she testified that she knew that prostitutes were kept at the Triple R Motel and that the money made from prostitution was split with Mrs. Reynolds was false testimony, and that in truth and in fact she had no knowledge of any prostitutes being kept at the Triple R Motel and that she had so testified in the trial of Lorenzo Livingston on a charge of

procuring, and that she she been persuaded to testify as she had testified at the trial of this cause due to anger because of Mrs. Reynolds having discharged her from her employment.

That had the witnesses, Lorenzo Livingston and Louis Livingston, been allowed to testify, they would have testified that the testimony they gave at the trial of this case on the question of guilt or innocence of the defendant, wherein they testified that the defendant had ordered them to keep prostitutes at the Triple R Motel and that they had split the money they received from prostitution at the Triple R Motel with Mrs. Reynolds was false testimony and that they had been persuaded to testify as they had testified in the trial of this cause by a promise of the District Attorney that if they would so testify the District Attorney would dismiss cases pending against Lorenzo Livingston for procuring;

WHEREUPON the Court sustained the State's objection to the admission of such testimony in support of defendant's motion for a new trial or Bill of Exception to which action of the Court the defendant did then and there in open Court object and except and assign as error on the grounds that where it is made known to the Court, before the motion for new trial is acted upon, the witnesses who testified at the trial of the defendant and on whose testimony the jury relied in finding the defendant guilty, charges contained in the information was false testimony and that the witnesses had repudiated said testimony, and the defendant should be granted a new trial, and that the

Court's refusal to hear the testimony of the tendered witnesses or allow the defendant to develop said witnesses' testimony for the purpose of a Bill of Exception was prejudicial to the defendant in that it denied the defendant the right to the Court's consideration of matters material to a proper disposition of defendant's motion for a new trial and defendant's right to a full and satisfactory consideration of the matters complained of on appeal.

(signed) JAMES L. MITCHELL,

JAMES L. MITCHELL,
706 Commercial Building,
Dallas, Texas,
Attorney for Defendant.

The foregoing Bill of Exception was dictated in open Court at the time of the hearing and a motion for a new trial and said bill was presented to the Court, and after having been considered by the Court and submitted to the attorneys for the State of Texas and having been found by them to be correct, and having been found by me to be a correct recitation of the facts and proceedings complained of, said bill is hereby allowed, approved, and ordered filed by the Clerk of this Court as a part of the record in this cause this the 5th day of July, A. D. 1954, being a time within the time allowed by law for the filing of Bills of Exception and is ordered filed as a part of the records of this case as defendant's bill of exception No. One. With the following qualifications by the court:

The above bill of exception with regard to what the appellant purported to prove by tendered witnesses is but a

contention of appellant. The trial court further qualifies the foregoing bill of exception as follows: That the motion for a new trial which is the basis of this bill of exception was not raised by the proper pleadings in that the motion for a new trial was not sworn to by the defendant; therefore, the question raised by the foregoing bill was not properly before the Court.

/s/ JOE B. BROWN,

Judge of the County Criminal Court of Dallas County, Texas.

DEFENDANT'S BILL OF EXCEPTION,
FILED July 6th, 1954.

ED H. STEGER, CLERK County Criminal Court, Dallas County, Texas, By (Signed) R. Burg.

Petitioner duly perfected her appeal to the Court of Criminal Appeals of the State of Texas, which is the court of last resort of the State of Texas in criminal litigation. On January 5, 1955, the Court of Criminal Appeals of the State of Texas affirmed the conviction of petitioner (See Appendix A), opinion of affirmance being found at Page 137 of the Record. Through regular and due channels petitioner filed her motion for rehearing in the Court of Criminal Appeals of the State of Texas, and in Paragraph six of said motion petitioner specifically and pointedly raised a substantial and fundamental constitutional question in that she specifically pointed out to the Court of Criminal Appeals that the affirmance of the conviction admittedly based on perjured testimony denies to petitioner a fair trial and

is a denial of due process of law (R. 142). On March 16, 1955, the Court of Criminal Appeals of the State of Texas overruled petitioner's motion for rehearing (R. 159) with a dissenting opinion by Associate Justice Davidson. See Appendix B (R. 160-167). With the over-ruling of petitioner's motion for rehearing, petitioner had exhausted all remedy in the State Courts, and the judgment in the State Courts had become final, as more fully appears in the Certificate of the Clerk of the Court of Criminal Appeals of the State of Texas, filed with the record in this cause, and here reprinted as Appendix E.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Criminal Appeals affirming the conviction of petitioner obtained by the use of perjured testimony is in direct conflict with the opinion of this Court in *Mooney v. Holohan, 194 U. S. 103, 79 L. Ed. 791;* and is in direct conflict with decision of that court in *Green v. State, 252 S. W. 499.*

Nowhere in the record is the contention of petitioner that she was convicted on perjured testimony disputed. That fact is conclusively shown by her Bill of Exception. That she was denied a fair trial as is contemplated by due process is not controverted. The State justifies its action on the sole basis of lack of verification of petitioner's motion for new trial.

Articles 753 and 754 of C. C. P. sets out the grounds on which a new trial may be granted. Nowhere do the Statutes

require a motion for a new trial to be verified. Article 757 of C. C. P. of Texas provides:

> "The State may take issue with the defendant upon the truth of any cause set forth in the motion for a new trial; and, in such case, the Judge shall hear evidence, by affidavit or otherwise, and determine the issue."

The State of Texas joined issue with petitioner by filing an answer to her motion for a new trial (R. 100). The Court was bound to hear evidence on the issues joined. This it refused to do, and by such refusal violated due process of law.

Never before has the rule requiring verification of pleadings been extended so as to apply to facts as here presented. The cases cited and relied on by the Court of Criminal Appeals do not support the rule announced as applied to the facts of this case.

Even conceding that under the rule petitioner's motion for new trial should have been sworn to, is the lack of such verification justification for the court to ignore fraud and deception practiced on the court and jury? Does the lack of verification justify a conviction based on perjury knowingly used by the prosecutor to obtain that conviction? Should the Rule be used to defeat rather than preserve substantial justice? We think not! It is respectfully submitted that the facts of this case reflect an injustice so pronounced as to shock the conscience of the court. We submit that Due Process of Law has been denied petitioner in that a fundamental and important right has been denied her by the

action of the State of Texas. We submit that the question is of a nature as to warrant intervention of this Honorable Court.

CONCLUSION

We pray that for all the reasons assigned this writ be granted.

Respectfully submitted,

CHARLES W. TESSMER,
202 Fidelity Building,
Dallas, Texas.

JAMES L. MITCHELL,
1415 Republic Bank Building,
Dallas, Texas.

TOM HOWARD,
1415 Republic Bank Building,
Dallas, Texas,
Attorneys for Petitioner.

I certify that three copies of this petition have been served on the Attorney General of the State of Texas by mailing, postage paid, to his office at Austin, Texas, this ..... day of ....., 1955.

.....
CHARLES W. TESSMER.

APPENDIX A

Cora Reynolds, Alias
Mrs. A. M. Reynolds, Appellant,

No. 27,258. v. —Appeal from Dallas County.

The State of Texas, Appellee.

OPINION

Appellant was convicted under Art. 514, P. C., on nineteen separate counts in the information which charged that on nineteen separate days she "did unlawfully keep, and was then and there concerned in keeping and did then and there aid and assist and abet in keeping a bawdy house." This statute provides that for each day any person violates its terms, he shall be fined $200 and confined in jail for twenty days. The judgment rendered herein against appellant was for 380 days confinement in jail and fines totaling $3,800.

It is not disputed that the appellant owned the motel here involved at all times alleged in the information.

The state's evidence shows that appellant, on each and all of the dates alleged in the nineteen counts upon which she was convicted, was operating said motel by and through her manager and porters who were conducting the business; that prostitutes were at said motel at said times for the purpose of prostitution and that they did commit illicit acts of intercourse with men, for which they received

money, in the cabins and houses kept and provided for them or other persons at the motel with the consent and knowledge of appellant's manager and porters; that appellant knew that said cabins and houses were being so kept, occupied and used for prostitution; and that she was paid by said manager and porters a percentage of the money which they received from the prostitutes for their acts of prostitution on the said nineteen days with knowledge that the money came in payment for acts of prostitution in her motel.

Appellant, while testifying in her own behalf, denied any knowledge of any acts or conduct on the part of anyone at said motel which would show the keeping or operating of a bawdy house.

The evidence supports the conviction under each of said nineteen counts of the information.

There is one formal bill of exception and no informal bills are indexed in the statement of facts filed on July 6, 1954.

Appellant delivered to the clerk of the County Criminal Court of Dallas County her "Index to Bills of Exception" to the statement of facts 155 or 156 days after she gave notice appeal, and the same was received by the clerk of this court on September 30, 1954.

If appellant desired to preserve for review her exceptions to the admission of evidence as shown in the statement of facts, it was incumbent upon her to see that the statement of facts included as a part thereof an index to the excep-

tions relied upon before she filed it. Art. 759a, Vernon's Ann C.C.P., Sec. 3; Greenwood v. State, 157 Texas. Cr. Rep. 58, 246 S. W. 2d 191; Tucker v. State, 157 Tex. Cr. Rep., 259, 247 S. W. 2d 901; Simone v. State, 157 Tex. Cr. Rep., 393, 248 S. W. 2d 938; Bristow v. State, 160 Tex. Cr. Rep., ... , 267 S. W. 2d 415.

By formal bill of exception, appellant complains of the refusal of the trial court to hear testimony in support of her motion for a new trial which alleged that the three principal witnesses that gave testimony against appellant would then testify that appellant did not have any knowledge of the acts of prostitution at said motel and that they testified falsely concerning her knowledge of said acts.

Appellant's motion for new trial is not verified or supported by affidavit and is therefore insufficient as a pleading and cannot be considered. Where matters extrinsic the record are sought to be presented as ground for new trial, the motion should be verified. The motion being insufficient, no error is shown in refusing to hear testimony in support thereof. Art. 756, C.C.P., Note 11; 31 Tex. Jur. 298, Sec. 95; Crittenton v. State, 146 Tex. Cr. Rep., 486, 176 S. W. 2d 757.

Finding no reversible error, the judgment of the trial court is affirmed.

Belcher, Judge

(Delivered January 5, 1955)
Opinion approved by the Court.

MINUTES OF COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. 27,258

CORA REYNOLDS, ALIAS
MRS. A. M. REYNOLDS,
Appellant,

vs.

THE STATE OF TEXAS,
Appellee.

APPEAL FROM THE COUNTY CRIMINAL
COURT OF DALLAS COUNTY, TEXAS

AFFIRMED

OPINION BY JUDGE BELCHER

JANUARY 5, 1955

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

APPENDIX B

Cora Reynolds,
alias Mrs. A. M. Reynolds, et al

No. 27,258, v. —Appeal from Dallas County

The State of Texas, Appellee

DISSENTING
OPINION
ON APPELLANT'S MOTION FOR REHEARING

In overruling appellant's motion for rehearing, my brethren affirm the conviction in this case upon the original opinion.

To that affirmance I do not agree, and respectfully enter my dissent, which is based upon two propositions:

First: The jury, by a verdict of not guilty in this case, acquitted appellant of the only offense charged against her in the information. The only judgment that should have been rendered was that of not guilty.

Second: Substantial justice and ordinary justice under the law were wholly and unjustifiably defeated when the trial court would not permit appellant, upon motion for new trial, to prove by the three witnesses who testified to material and damaging facts against her upon the trial of this case that they committed perjury when they so testified and that the facts to which they had testified were not true but false.

I will discuss these propositions in the order named.

This conviction was under Art. 514, Vernon's P. C., prohibiting the keeping of a bawdy house, which article reads as follows:

> "Any person who shall directly, as agent for another or through an agent, keep or be concerned in keeping, or aid or assist or abet, in keeping a bawdy or disorderly house in any house, building, edifice or tenement, or shall knowingly permit the keeping of a bawdy or disorderly house in any house, building, edifice or tenement owned, leased, occupied or controlled by him or her, directly, as agent for another or through any agent, shall be fined two hundred dollars and confined in jail for twenty days for each day he or she shall keep, be concerned in keeping or knowingly permit to be kept such bawdy or disorderly house."

This statute creates one continuous offense, with punishment authorized to be assessed for each day's violation.

The information in this case contains twenty-six separate counts.

Count No. 1 alleges that appellant "on or about the 20th day of May, 1953, in the City of Dallas and State of Texas did unlawfully keep, and was then and there concerned in keeping, and did then and there aid and assist and abet in keeping, a bawdy house there situate; the said house being then and there a house kept for prostitution, and being then and there a house where prostitutes were then and there permitted to resort and reside for the purpose of plying their vocation."

The remaining twenty-five counts are exact duplications of Count No. 1, with the exception of the date the offense was alleged to have been committed. Count No. 2 alleges that the offense there charged was committed "on or about the 19th day of June, 1953." The remaining counts allege on or about certain dates subsequent thereto and ranging anywhere from two and three days apart to three months apart. The last count (No. 26) alleges that the offense there charged was committed "on or about the 24th day of January, 1954."

The information was filed on the 29th day of January, 1954.

There is no escape from the conclusion that the information and each of the twenty-six counts charged but one offense—which was the keeping of a bawdy house.

The time element in the statute—that is, the fixing of a specific punishment for "each day" the house is kept is no part of the offense but is entirely one relating to punishment for the doing of that unlawful act. It is well established that the state may include in one indictment or information as many counts as it desires in charging the same offense or transaction. Branch's P. C., Sec. 507. So, also, may the state charge misdemeanors in separate counts of the information. Branch's P. C., Sec. 509.

So, also, is it true that the state may allege in an indictment or information that an offense charged was committed "on or about" a certain date and that no necessity exists that the date be otherwise alleged. When an offense

is alleged to have been committed "on or about" a certain date, the state may prove under such an allegation that the offense was committed at any time prior to the date of the filing of the information or indictment that is within the period of limitation. Branch's P. C., Sec. 439; 21A, Texas Digest, Indictment and Information, Key 87(2) and authorities there cited. One of the latest expressions attesting the rule is that of Ex parte Watkins, 159 Texas Crim. Rep. 14, 259 S. W. 2d 215.

Applying the rule just stated here, a conviction could have been obtained under Count No. 1, upon facts showing that the offense occurred on the date alleged in Count No. 26; equally, a conviction could have been obtained under Count No. 26, upon facts showing that the offense was committed on the date alleged in Count No. 1. The same would be true as to all other counts in the information—that is, a conviction could have been obtained under any count of the information upon any date alleged in any count of the information.

The rules to which I have called attention have so long been the settled law of this state that they ought to be now deemed axiomatic.

In submitting the case to the jury the trial court here submitted, separately, each of the twenty-six counts in the information and instructed the jury to the effect that if they believed the appellant guilty of having committed the offense there alleged, "on or about" the date alleged therein, they should find her guilty and assess her punishment

at a fine of two hundred dollars and by confinement in the county jail for twenty days. The practical and working effect of such a charge was to submit the same offense twenty-six times, not twenty-six different offenses. There was contained in the charge the general instruction, also, to the jury that they should acquit appellant if they entertained a reasonable doubt as to her guilt.

Under such a charge, the jury returned twenty-six separate verdicts.

Upon each of the first seven counts of the information appellant was found not guilty. Upon each of the remaining nineteen counts she was found guilty, as charged in that count.

Upon that verdict the trial court rendered judgment against appellant for a fine of $3,800 and 380 days in jail.

Under the information, the court's charge, and the verdict, was the trial court warranted in entering the judgment that he did? If not, then what judgment should have been rendered?

Reference is had to the case of Novy v. State, 62 Tex. Cr. Rep. 492, 138 S. W. 139. There, we said:

> "It is well established that such an offense as is charged in this case is a continuous one, and a conviction bars all further or other prosecutions up to the time of the conviction, unless the indictment or information carves out the time of the commission of the offense, and the evidence, as well as the pleading, is

confined to such time so carved out. Huffman v. State, 23 Tex. App. 491, 5 S. W. 134; Fleming v. State, 28 Tex. App. 234, 12 S. W. 605.

"In our opinion the information in this case carves out but one offense and limits the time for that one offense as between the dates July 1, 1909, and November 1, 1909. Evidence can be introduced of any particular day within that time or for each and every day or any other day within the time; but one conviction only can be had for one offense only. The evidence could be introduced and is admissible for each and every day for the purpose of fixing the character of the house and showing the character of the keeping so as to establish the offense."

The holding in the Novy case was cited with approval in Grissom v. State, 119 Tex. Cr. Rep. 494, 43 S. W. 2d 580.

The authorities appear to be in complete accord with the conclusion that under the information, as drawn and submitted by the trial court, only one offense was alleged, submitted, or involved, and that offense constituted the only unlawful act charged against appellant.

The sole and only offense was submitted by the trial court to the jury in applying Count No. 1 of the information.

By its verdict of not guilty, the jury acquitted appellant under the accusation contained in that count and thereby acquitted her of the only offense charged against her in the information. What happened after that acquittal is wholly immaterial and of no significance, for when a jury renders a verdict of not guilty the accused is acquitted and the state has no appeal.

The only judgment the trial court was authorized to enter in the instant case was that finding appellant not guilty. That is what the jury found.

Such finding of not guilty is, by my brethren, disregarded without, in my opinion, justification or excuse.

As to the second proposition:

This record affirmatively reflects that three admitted prostitutes testified upon the trial of the case to facts material to the state's case and very damaging to the appellant. In fact, the conclusion is altogether proper that without their testimony the facts would not have authorized the conviction.

After the trial, the three witnesses made known to appellant's counsel that the facts, and especially the material facts, to which they had testified were false and untrue and did not occur.

Appellant's counsel incorporated in the motion for new trial an allegation setting forth the above information and prayed that the trial court hear the testimony of the witnesses.

The motion for new trial was not sworn to by the appellant, nor was there attached to the motion the ex parte affidavit of the witnesses.

The bill of exception by which this question is brought, here, certified that the three witnesses were present in court when the motion for new trial was presented to and

heard by the trial court, and that they would have testified as to their false and perjured testimony had they been permitted to do so. The bill of exception further certifies that the sole and only reason the trial court refused to permit the witnesses to testify and to hear the testimony was because the motion for new trial was not sworn to by affidavit of the witnesses.

This court has repeatedly held that a new trial will be granted where a witness whose testimony is essential to the conviction subsequently swears that such testimony was false and that perjury was committed in the testimony. 31 Tex. Jur., New Trial—Criminal Cases, Sec. 64, p. 260.

Indeed, there is strong support of the proposition that a conviction which rests and is obtained upon perjured testimony violates due process of law.

In any event, the trial court refused to hear the testimony of the witnesses as to their perjury and the reason prompting them to so testify.

In affirming this case my brethren approve and sustain the trial court's ruling.

The over-all picture here presented is as follows:

The three witnesses testify to material and damaging facts against the appellant and favorable to the state. Upon motion for new trial those same witnesses are in court, ready and willing to testify and, had they been permitted, would have testified that the testimony they gave was not

only false and untrue but perjured. The trial court refuses to permit the witnesses to so testify only because the motion for new trial alleging the facts of such perjured testimony was not sworn to by the appellant or her attorney.

The statute law of this state no where provides that the motion for new trial shall be sworn to. Such requirement stems entirely from court-made rules, without legislative approval.

But conceding that under the rules the motion should have been sworn to, is such rule to be used to defeat rather than to preserve substantial justice? To my way of thinking, no other construction may be given to the majority holding than that it does so and is here applied. I cannot help wondering, under the conditions here presented, if the time has come when the great State of Texas is not only willing to so deprive but insists that one of its citizens shall be deprived of her liberty upon known and admitted perjured testimony.

When the state placed the three witnesses upon the witness stand upon the trial of the case, it vouched for their credibility and said thereby that they were worthy to be believed. It was these same witnesses who were ready to testify that they had committed perjury in their first testimony. Surely it does not rest with the state to attack their credibility, or to say that they are not worthy of belief.

To my mind, substantial justice in this case demands that the witnesses should have been permitted to testify

upon the hearing of the motion for new trial and if their testimony was false and perjured that a new trial should have been awarded.

Davidson, Judge

(Delivered March 16, 1955.)

APPENDIX C

Cora Reynolds,
alias Mrs. A. M. Reynolds, et al

No. 27,258. v. —Appeal from Dallas County

The State of Texas, Appellee

OPINION
ON MOTION FOR REHEARING

We have re-examined the record in the light of appellant's motion for rehearing and remain convinced that the appeal was properly disposed of on original submission.

Appellant's motion for rehearing is overruled.

Morrison, Presiding Judge

(Delivered March 16, 1955.)

APPENDIX D

Supreme Court of the United States

No. ....., October Term, 1955

EX PARTE

CORA REYNOLDS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 14th, 1955.

/s/ HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 13th day of June, 1955

APPENDIX E

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS AUSTIN, TEXAS

I, Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify that Cause No. 27,258, styled CORA REYNOLDS, *alias* MRS. A. M. REYNOLDS v. STATE OF TEXAS, was affirmed by this Court on January 5, 1955, Appellant's Motion for Rehearing was overruled [Judge Davidson filed dissenting opinion] March 16, 1955, Mandate issued April 1, 1955, and Order Recalling Mandate to Permit Application for Writ of Certiorari to the Supreme Court of the United States issued and filed April 20, 1955.

THEREFORE, this case was disposed of by this Court with the overruling of Appellant's Motion for Rehearing and mandate would not have been withdrawn if appellant had not filed a Motion to Withdraw Mandate so that Application for Writ of Certiorari could be filed in the Supreme Court of the United States.

With the overruling of Appellant's Motion for Rehearing, appellant has exhausted all remedy in this Court, and said judgment has become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office in Austin, Texas, this 28th day of May, A. D. 1955.

GLENN HAYNES,

Clerk, Court of Criminal Appeals

APPENDIX F

Code of Crim. Procedure of the State of Texas, Annotated, Vol. 3, P. 3

ARTICLE 753—Grounds for new trial in felony.

New trials, in cases of felony, shall be granted for the following causes, and for no other:

1. Where the defendant has been tried in his absence, or has been denied counsel.

2. Where the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant.

3. Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors.

4. Where a juror has received a bribe to convict, or has been guilty of any other corrupt conduct.

5. Where any material witness of the defendant has, by force, threats, or fraud, been prevented from attending the court, or where any written evidence, tending to establish the innocence of the defendant, has been intentionally destroyed or removed so that it could not be produced upon the trial.

6. Where new testimony material to the defendant has been discovered since the trial. A motion for a new trial on this ground shall be governed by the rules which regulate civil suits.

7. Where the jury, after having retired to deliberate upon a case, have received other testimony; or where a juror has conversed with any person in regard to the case; or where any juror at any time during the trial or after retiring, may have become so intoxicated as to render it probable his verdict was influenced thereby. The mere drinking of liquor by a juror shall not be sufficient ground for a new trial.

8. Where, from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial. It shall competent to prove such misconduct by the voluntary affidavit of a juror; and the verdict may, in like manner, be sustained by such affidavit.

9. Where the verdict is contrary to law and evidence—a verdict is not contrary to the law and evidence, within the meaning of this provision, where the defendant is found guilty of an offense of inferior grade to, but of the same nature as, the offense proved. O. C. 672.

Code of Crim. Procedure of the State of Texas,
Annotated, Vol. 3, P. 90

ART. 754—In Misdemeanors

New trials in misdemeanor cases may be granted for any cause specified in the preceding article, except that contained in subdivision one of said article.

Code of Crim. Procedure of the State of Texas, Annotated, Vol. 3, P. 110

ART. 757—State may controvert motion.

The State may take issue with the defendant upon the truth of any cause set forth in the motion for a new trial; and, in such case, the judge shall hear evidence, by affidavit or otherwise, and determine the issue.

SEP 13 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 236

CORA REYNOLDS,
Petitioner.

v.

STATE OF TEXAS,
Respondent.

MOTION OF RESPONDENT TO STRIKE PETITION ON GROUNDS IT CONTAINS SCANDALOUS MATTER AND IN THE ALTERNATIVE, RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN BEN SHEPPERD
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Capitol Station
Austin, Texas

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 236

CORA REYNOLDS,
Petitioner.

v.

STATE OF TEXAS,
Respondent.

MOTION OF RESPONDENT TO STRIKE PETITION ON GROUNDS IT CONTAINS SCANDALOUS MATTER

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes the State of Texas, Respondent in the above entitled and numbered cause, and moves the Court as follows:

I.

For an order, pursuant to Rule 40, Paragraph 5, of the Revised Rules of the Supreme Court, which states:

> "5. Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, im-

material, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court."

The wording particularly complained of is found on page 3 of Applicant's petition, wherein Petitioner states "The sole basis of the conviction of petitioner was perjured testimony, knowingly used by the prosecuting authorities to obtain that conviction."

The grounds for this Motion are that the allegations contained in such Petition are scandalous; that no evidence is admissible in support thereof; that it is calculated to unduly prejudice the court against the Respondent, and to cast doubt upon the integrity and ethics of the Respondent.

II.

And for such further answer herein, if such be necessary, and without in any way waiving the Motion to Strike, hereinbefore requested, the Respondent further continues by filing Brief of Respondent in Opposition to Petition for Writ of Certiorari as hereinafter set out.

Respectfully submitted,

JOHN BEN SHEPPERD
Attorney General of Texas

JOHN WILD
Assistant
Capitol Station
Austin, Texas

Counsel for Respondent
State of Texas

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 236

CORA REYNOLDS,
Petitioner.

v.

STATE OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes the Respondent, acting by and through John Ben Shepperd, Attorney General of the State of Texas, and files this its brief in opposition to Petitioner's Petition for Writ of Certiorari and would respectfully show the Court:

Opinion Below

The Opinion below of the Court of Criminal Appeals is reported at 276 S.W. 2d 279 and a copy

of said opinion appears in Petitioner's Application in Appendix A, pages 15 to 18. Said opinion was rendered and entered on January 5, 1955. A motion for rehearing was overruled on March 16, 1955, the majority and dissenting opinions appearing in Annex B in Petitioner's Application, pages 19-29. On motion made by Petitioner, the Texas Court of Criminal Appeals on April 20, 1955, recalled its mandate and ordered a stay of proceedings for 90 days to permit the filing of Petitioner's Application for Writ of Certiorari in this Honorable Court.

Jurisdiction

1. Nowhere in the trial record, and particularly in Petitioner's Bill of Exceptions and Motion for New Trial, did Petitioner specially set up or claim any title, right, privilege, or immunity under the Constitution of the United States.

2. The grounds of error here presented were never urged in any manner before the trial court and under the rules of practice in the Court of Criminal Appeals in Texas, the Court could not consider such alleged errors.

3. A substantial Federal Question never having been properly raised in the State Court Proceedings, the State Court could not and did not pass on any such question and therefore this Court is without jurisdiction to consider Petitioner's Petition for Writ of Certiorari and the same should be denied.

Argument and Authorities on Jurisdiction of the Supreme Court

(Respondent's record references are to the Statement of Facts and to the Transcript on file in the Court of Criminal Appeals of Texas.)

As its first proposition in opposition to the petition of Cora Reynolds, the Respondent calls the attention of this Honorable Court to the fact that at no time has Petitioner complied with the jurisdiction requirements of this Court concerning its review of State decisions by Writ of Certiorari.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3) without complying with the requirements of such statute in setting up or claiming any right, title, privilege or immunity under the Constitution of the United States at the appropriate time in the State proceedings.

A review of the record discloses that the question here presented was never raised in the Petitioner's Motion for New Trial (R. 64), or in her Bill of Exception (R. 115) presented to the Court of Criminal Appeals.

The scope of review by the Court of Criminal Appeals of Texas is limited to the grounds or assignments of error which a defendant has preserved by an adequate Bill of Exception and Motion for a New Trial in the trial court. The Texas Court has expressly held that such motions as are not thus set up or assigned cannot be considered by it on appeal. *Zwieg v. State*, 74 Tex. Crim. Rep. 306, 171 S.W. 747; *Harvel v. State*, 126 Tex. Crim. Rep. 581, 72

S.W. 2d 604; and this course has been followed even in a death penalty case where an appeal complaint was first made of matters neither objected to nor excepted to during the trial. *Fisher v. State*, 107 Tex. Crim. Rep. 383, 2 S.W. 2d 249.

This Honorable Court has repeatedly stated that the litigant must follow State procedures in raising the Federal question. That any failure to do so is fatal to his chances for Supreme Court Review. That when required by State practice, the Federal question must be raised before the trial court, and must be presented to the trial court at the point considered appropriate under State procedure. As early as 1877, this Honorable Court advanced and adhered to the policy that it did not have jurisdiction of an alleged violated right that was not pointed out in the trial court, when required to be raised in the trial court for State Court appellate review. Spies, 31 Lawyer's Edition 80. Subsequent to that time the Court's policy has remained the same and can be seen in *Hulbert v. Chicago*, 202 U.S. 275, 50 L.Ed. 1026, 26 S. Ct. 617. (Complete failure to raise question at trial court level); *Brown v. Massachusetts*, 144 U.S. 573, 12 S.Ct. 757, 36 L.Ed. 546 (failure to raise question before verdict held to be fatal); *Edelman v. California*, 97 Lawyer's Edition 227 (question raised for first time as one of grounds of appeal); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 47 L.Ed. 480; 23 S.Ct. 375, 63 L.R.A. 33 (failure to raise the question both in trial court and on appeal).

As shown by a review of the record in this case, a federal question was not raised in the trial court

either by Bills of Exceptions or in Motion for New Trial as required under Texas procedure.

Contrary to allegations of the Petitioner, nowhere in either of those instruments is there any allegation that Petitioner had been denied any right, title, privilege or immunity guaranteed by the Constitution of the United States. At no point in the State Court proceeding did Petitioner use even such vague terms as "denial of due process," "unconstitutional," or "Fourteenth Amendment"—much less did she point out an alleged specific violation of the Fourteenth Amendment of the Federal Constitution.

It was not until the Petitioner filed her Motion for Rehearing that any comment was made about denial of due process. This Honorable Court has further adhered to the principle that raising the Federal question for the first time in a petition for rehearing addressed to the highest court is insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station W.O.W. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092; *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1930; *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231; *Forbes v. State Council*, 216 U.S. 396, 30 S.Ct. 295, 54 L.Ed. 534; *Simmerman v. Nebraska*, 116 U.S. 54, 6 S.Ct. 333, 29 L.Ed. 535. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and accordingly denied. *Consolidated Turnpike Co. v. Norfolk and O.V.R. Co.*, 228 U.S. 326, 33 S.Ct. 510, 57 L.Ed. 857. See also *McCorquo-*

dale v. Texas, 211 U.S. 432, 29 S.Ct. 146, 53 L.Ed. 269, wherein this Honorable Court said:

> "This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the Court of last resort of a State after that Court has pronounced its final decision. *Loeber v. Schroeder*, 149 U.S. 580, 585; Pim v. St. Louis, 165 U.S. 273. *It is true that we have also decided that if the Court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the Court has done so.* Mallett v. North Carolina, 181 U.S. 589; *Leigh v. Green*, 193 U.S. 79; Cokran Oil Co. v. Arnaudet, 199 U.S. 182, 193; Fullerton v. Texas, 196 U.S. 192; McMillen v. Ferrum, 197 U.S. 343. It can hardly be said to so appear in the case at bar. The order of the Court is nothing more than a denial of the motion. In other words it expresses no more than would lie implied from a simple denial of the motion." (Emphasis added.)

In view of the above decisions and the adherence of this Honorable Court to a well defined policy requiring any Federal question to be properly raised under state procedure, Petitioner has failed to invoke the jurisdiction of this Supreme Court. Therefore, there being no Federal question properly presented and pursued in this case, this Honorable Court is without jurisdiction and Petitioner is without right to a Writ of Certiorari herein.

The Question Presented

1. Assuming, *arguendo*, that jurisdiction exists, did the Court of Criminal Appeals in affirming the trial court deny Petitioner due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States?

Statement of the Case

Upon jury trial in the County Criminal Court of Dallas County, Texas, Petitioner, Cora Reynolds, was convicted on March 18, 1954 on nineteen (19) separate counts of keeping a Bawdy House (R. 58). Article 514, Penal Code of the State of Texas, provides a mandatory sentence of a fine of two hundred dollars ($200.00) and confinement in the county jail for twenty (20) days for each day she was convicted of operating a bawdy house. Judgment was accordingly entered on March 18, 1954, ordering Petitioner confined in the county jail for three hundred eighty (380) days, and assessing a fine of three thousand eight hundred dollars ($3,800.00), together with costs of court. (R. 61)

On appeal to the Court of Criminal Appeals, Petitioner contended that the trial court erred in overruling Petitioner's Motion for New Trial. Petitioner argued that the trial court erred by refusing to allow testimony at the hearing on the Motion for New Trial which the Defendant's Attorneys now allege would have shown that evidence presented at the trial was perjured testimony.

The opinion of the Court of Criminal Appeals, delivered January 5, 1955, found no reversible error and affirmed the judgment of the trial court. The affirmation was based on the ground that "Appellant's Motion for New Trial is not verified or supported by affidavit and is therefore insufficient as a pleading and cannot be considered. Where matters extrinsic to the record are sought to be presented as ground for new trial, the motion should be verified. The motion being insufficient, no error is shown in refusing to hear testimony in support thereof. Art. 756, CCP, Note 11; 31 Tex. Jur. 298, Sec. 95; *Crittenton v. State*, 146 Tex. Cr. R. 486, 176 S.W. 2d 757."

Argument

The question here presented, to quote from the brief of the Petitioner, is:

> "Does a conviction obtained under the facts above stated violate the due process provision of the 14th Amendment to the Constitution of the United States?"

It is a well recognized principal of law that when an inculpatory witness swears that testimony given at the trial was false, a new trial should be ordered. *Schwartz v. State*, 149 S.W. 2d 96; *Jordan v. State*, 221 S.W. 2d 246. It is equally elementary that before a trial judge can consider the merit of such a request, it must be properly before him. Simple allegation on

the part of an attorney has never been sufficient to bring such matters before the court. It has long been a settled rule in Texas that motions for new trials should be sworn to. *Hicks v. State*, 75 Cr. R. 461, 171 S.W. 755. To have a rule otherwise would throw the doors of the courtroom open to every type and manner of delaying and harrassing tactics. This problem was recognized early by our ancestors and the rule was settled as far back as 1877. *Terry v. State*, 3 Tex. App. 236. The Petitioner in this case admits that the rule is settled in regard to the requirement of sworn pleadings when the ground for the New Trial is that new evidence has been found. (Appellant's Brief, p. 13). Thus Branch, in his Annotated Penal Code, states the rule as follows:

> "Sec. 193. *Motion must be sworn to.* A motion for new trial on the ground that new testimony material to the defendant has been discovered since the trial must be sworn to. *Campbell v. State*, 29 Tex. 490. *Love v. State*, 3 Tex. Crim. App. 501. *Hall v. State*, 33 Tex. Crim. Rep. 191, 26 S.W. 72. *Corrosco v. State*, 34 Tex. Crim. Rep. 565; 31 S.W. 649. *Vick v. State*, 51 S.W. 1117. *Sykes v. State*, 53 Tex. Crim. Rep. 165, 108 S.W. 1179. *Martin v. State*, 57 Tex. Crim. Rep. 595, 124 S.W. 683."

Petitioner claims that the decision of the Court of Criminal Appeals affirming the conviction is in direct conflict with the opinion of this Court. In *Mooney v. Holomann*, 194 U.S. 103, 79 L.Ed. 791;

and is in direct conflict with decision of that court in *Green v. State*, 252 S.W. 499. Respondent does not feel that such analysis is correct. In the Mooney v. Holoman case, it is conceded that perjured testimony was used in the conviction of the accused. The court in that case said:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty *through a deliberate deception of court and jury by the presentation of testimony known to be perjured.*" (Emphasis added.)

In the present case, these same facts are not present. The motion for new trial was not supported by any oath or affirmation of the witnesses who are alleged to have sworn falsely, nor by counsel attesting to the truth of the allegations set out in this motion for a new trial. The trial court was here asked by counsel to set aside the verdict of the jury and grant a new trial on the unsworn statement of counsel that three witnesses who testified for the State had made *unsworn* statements out of court to the effect that they had sworn falsely under oath at the time of the trial. Petitioner is here asking this court to reverse a case because the trial court refused to grant a new trial upon a hearsay statement of an attorney which was based upon the unsworn statements of three wit-

nesses. It could hardly be said that there was a "deliberate deception of court and jury by the presentation of testimony known to be perjured," *Mooney v. Holeman*, supra., when in truth and in fact the only evidence to the effect that it was true was the ipse dixit of the defendant's attorney, who had every opportunity to properly present the issue before the court for consideration, but instead chose the unsworn, insufficient methods herein described.

The case cited by Petitioner as being in direct conflict with the case now being considered, *Green v. State*, 252 S.W. 499, decided by the Court of Criminal Appeals of Texas in 1923, is in truth not in conflict. In that case, a new trial was granted on the basis of affidavits presented with the application for new trial. To quote the court:

> "In support of his motion for new trial, *appellant attached an affidavit* that State witness Williams had retracted, and stated that his testimony as given on the trial was untrue." *Green v. State*, supra. (Emphasis added.)

It is the very absence of this attached affidavit or verification that the present case was decided on. It has always been the rule in Texas that such motions must be sworn to, that simple allegation without cerification or affidavit attached is an insufficient pleading to raise the issue. *Thus Branch*, supra.

Petitioner was duly and properly tried in a Texas court for a Texas crime and since Petitioner has

not raised a federal question with any merit, this Honorable Court is not concerned.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

JOHN BEN SHEPPERD
Attorney General of Texas

JOHN A. WILD
Assistant
Capitol Station
Austin, Texas

Attorneys for Respondent